BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRENDA L. TRACY	)	
Claimant	)	
VS.	)	
	)	Docket No. 222,386
ANTHONY HOSPITAL	)	
Respondent	)	
AND	)	
	)	
COMMERCIAL UNION INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Nelsonna Potts Barnes on March 10, 1998. The Appeals Board heard oral argument November 13, 1998.

APPEARANCES

David H. Farris of Wichita, Kansas, appeared on behalf of claimant. Kendall R. Cunningham of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The two issues on appeal are: (1) the amount of claimant's average weekly wage and (2) the nature and extent of claimant's disability. The ALJ found an average weekly wage of $214.29 and awarded a 74 percent work disability. As to average weekly wage, respondent contends the wage should be calculated from a different date of accident, the last date claimant worked, and as a result should be lower than the wage found by the ALJ. Respondent makes two general challenges to the ALJ's finding on work disability. Respondent first contends the claimant failed to make a good faith effort to find employment after her injury and should, for that reason, be limited to disability based on functional impairment only. Respondent next contends that the task loss found by the ALJ is too high and, if work disability is awarded, it should be less than awarded.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Award should be affirmed.

Findings of Fact

1. Claimant worked for respondent as a nurse's aide from October 23, 1995, to December 13, 1996, a period of approximately 14 months. Her duties included changing linens, carrying trays, bathing patients, transferring patients, assisting patients to the bathroom, and walking with patients.

2. On June 1, 1996, claimant began having back pain while transferring a patient to a chair. Claimant continued to work, performing the same duties, and her symptoms became worse.

3. Claimant had another incident on October 11, 1996, when a patient's leg gave out as claimant transferred the patient from a bed to the commode. Claimant describes this as another traumatic incident but does not mention any symptoms at that time. Claimant does testify that her back condition continued to worsen until December 13, 1996. On that date, her legs gave out at home while she was bent over the bathtub rinsing her daughter's hair.

4. Claimant began receiving medical treatment for her back before she left work in December. She saw Dr. David Jones, at respondent's request, in October. Dr. Jones prescribed physical therapy and muscle relaxants. In December, Dr. Jones admitted claimant to the hospital. Dr. Stein consulted and an MRI was done. The MRI revealed three bulging discs and a partially herniated disc. Dr. Stein referred claimant to Dr. Pedro A. Murati, a physiatrist.

5. Dr. Murati first saw claimant on February 25, 1997. Dr. Murati took a history which included an initial back injury three years earlier while lifting a patient at a nursing home, re-injury in September 1995, and then the two incidents while working for respondent—the one in July 1996 and the other in October 1996. Claimant also informed Dr. Murati of the incident at home in December 1996 while washing her daughter's hair.

From the initial examination, Dr. Murati concluded claimant was at MMI but recommended work hardening, evaluation for use of a TENS unit, and temporary work restrictions.

6. As Dr. Murati had recommended, claimant participated in work hardening beginning March 5, 1997. When Dr. Murati saw claimant again April 3, 1997, he felt she had made excellent progress and released her to her regular duty.

7. Claimant called Dr. Murati's office a few days after the April 3, 1997, exam and advised she was having additional pain. The next day respondent's administrator called to

express concern about the lack of restrictions. The administrator requested an FCE be done.

8. The FCE, done on May 1, 1997, demonstrated claimant did not meet the physical demands required for her job as a nurse's aide.

9. Dr. Murati examined claimant again on May 6, 1997. At that time, he rated claimant's impairment as 5 percent of the whole body based on a diagnosis of lumbosacral strain. He also adopted the restrictions from the FCE which indicated claimant could not return to work as a certified nurse's aide.

10. When Dr. Murati first testified in November 1997, he noted that May 1997 was the first mention of a lumbosacral strain. Earlier diagnosis had been SI joint dysfunction. Dr. Murati decided he should reexamine claimant to determine whether claimant had a lumbosacral strain. He did so on November 17, 1997. At this examination, claimant gave a history of falling down the stairs. The records indicated this had occurred in August 1997. Based on records of treatment after the fall, Dr. Murati apportioned 2.5 percent of a 5 percent rating to work injury and 2.5 percent to the subsequent fall down the stairs.

11. Dr. Murati reviewed lists, prepared by Jerry D. Hardin and Karen C. Terrill, of tasks claimant did at work in the 15 years before her injury. Dr. Murati agreed with the conclusions of Mr. Hardin based on Dr. Murati's restrictions. Mr. Hardin had given two opinions, one a straight percentage of tasks claimant can not do in each job. He totaled those percentages and divided by the number of jobs. Using this method, he arrived at a task loss of 42 percent. Mr. Hardin also provided a time-weighted task loss opinion showing a loss of 47 percent.

Dr. Murati disagreed with some of the task loss opinions by Ms. Terrill. After reviewing the list prepared by Ms. Terrill, he concluded claimant can not do 13 of 42 tasks for a 31 percent loss. Ms. Terrill later testified about the number of times per day claimant had performed certain of these tasks. Based on her testimony, it appears Dr. Murati may not have eliminated some of the tasks if he had been informed more fully about the number of times per day claimant performed the tasks. Claimant's counsel calculated the task loss on a time-weighted basis applying Dr. Murati's restrictions to Ms. Terrill's task list but, because it is not clear that Dr. Murati properly understood the tasks listed by Ms. Terrill, the Board finds the evidence does not establish a time-weighted task loss using Ms. Terrill's task list.

12. Claimant presented respondent with the restrictions from Dr. Murati and asked for accommodated work. Respondent advised it could not return claimant to work with those restrictions.

13. Since her release by Dr. Murati, claimant has received unemployment compensation benefits and satisfied job-seeking requirements for those benefits. She has also participated in and cooperated with a job placement program through Ms. Terrill. Respondent contends claimant did not do all that might be expected in seeking

employment. The evidence shows she did forward over 200 résumés to employers. She applied at 28 employers in person during the nine weeks of the placement program. The Board concludes claimant made a good faith effort to find employment but found none. Ms. Terrill testified claimant should have made a more aggressive job search. In some cases, she contacted prospective employers and they found no record that claimant had applied. Ms. Terrill did, however, also testify that claimant was cooperative in the job search efforts.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1996 Supp. 44-501(a).

2. K.S.A. 1996 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

3. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

4. The Board finds claimant has made a good faith effort to find employment since she left employment for respondent.

5. The Board finds claimant is entitled to work disability, having suffered a compensable whole body injury which made her unable to perform the job she was performing for respondent and claimant has not, despite good faith efforts, been able to find employment which pays at least 90 percent of the wage she earned for respondent.

6. The Board finds claimant has a 100 percent wage loss.

7. The Board finds claimant has a 47 percent loss of ability to perform the tasks she performed during the 15 years before her current injury. In so finding, the Board has adopted the time-weighted opinion approved by Dr. Murati from Mr. Hardin's report. *Dehncke v. Marks Carpets and Cigna and Kansas Workers Compensation Fund,* Docket No. 189,455 (November 1995).

8. Claimant has a work disability of 74 percent based on a 47 percent task loss and a 100 percent wage loss.

9. The dates of accident in this case are June 1, 1996, and October 11, 1996. Respondent stipulated to both dates of accidents. The Board finds this is not a repetitive trauma type of injury but rather one with the two dates of accident. The parties have, without objection, treated the case as a single injury and the Board, accordingly, has also treated it as one injury.

10. Claimant's average weekly wage is $214.29. This wage has been calculated from the October 11, 1996, date of accident, and the parties have agreed that if this date is used the wage is correct for that date.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes on March 10, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority's finding of a 47 percent task loss. As K.S.A. 44-510e now provides, one of the prongs of the formula for permanent partial general disability is the loss of ability to perform work tasks that the claimant performed during the 15-year period before the accident. Nothing in the statute suggests we are to either

consider or attempt to measure the amount of time an employee has spent in those tasks. In some situations the percentage of lost tasks might approximate the percentage of time those lost tasks represent; in many instances it will significantly differ.

If the test were to determine the percentage of time one engaged in those lost tasks, a time-weighted analysis would be appropriate. However, since that is clearly not the test, the majority is inappropriately applying a standard and test other than the one provided by statute. The statutory language is clear that permanent partial general disability is determined by averaging the percentage of wage loss with the percentage of loss of "ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident . . . ." K.S.A. 44-510e(a). "When a statute is plain and unambiguous the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be." *Martindale v. Tenny*, 250 Kan. 621, 626, 829 P.2d 561 (1992) (quoting *Randall v. Seemann*, 228 Kan. 395, Syl. ¶ 1, 613 P.2d 1376 [1980]).

BOARD MEMBER

c: David H. Farris, Wichita, KS
Kendall R. Cunningham, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director